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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

STATE OF COLORADO,

Petitioner,

v.

IDARADO MINING CO. et al.,

Respondents.

AMICUS BRIEF IN SUPPORT OF COLORADO'S PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

AMICUS BRIEF OF THE STATES OF OHIO, CALIFORNIA, HAWAII, IOWA, KANSAS, ILLINOIS, MINNESOTA, MISSOURI, MONTANA, NEW MEXICO, NORTH CAROLINA, PENNSYLVANIA, SOUTH CAROLINA, UTAH, AND VERMONT

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STATEMENT OF INTEREST

The *amici* states are charged with the responsibility of protecting the health and safety of their citizens, as well as the integrity of their lands, waters, and other natural resources, from the dangers of hazardous substances. The states thus have a vital interest in seeing that the cleanup of hazardous substances within their boundaries is performed in an effective fashion. Where the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) provides cleanup standards necessary for the protection of the environment, the states have an interest in ensuring that the cleanup standards are implemented. To that end, the states seek to preserve the injunctive relief provided to the states by Congress in Section 121(e)(2) of CERCLA authorizing the states to enforce these cleanup standards. Because the decision of the Court of Appeals for the Tenth Circuit prohibits the use of this injunctive relief in most situations, the *amici* states respectfully request that the Court grant Colorado's Petition for a Writ of Certiorari and reverse the court below.

REASONS FOR GRANTING THE PETITION

I. Pursuant To Section 121(e)(2) of CERCLA, 42 U.S.C. 9621(e)(2), Congress Has Authorized The States To Obtain Injunctive Relief In Order To Enforce CERCLA Requirements At Hazardous Substance Sites.

Section 121(e)(2) of CERCLA, 42 U.S.C. 9621(e)(2), provides states with the ability to enforce in federal court "any federal or state standard, requirement, criteria, or limitation" required by CERCLA. Contrary to the decision of the court below, nothing in this provision restricts enforcement of standards to only those sites at which the U.S. Environmental Protection Agency ("U.S.EPA") happens to have established a presence. As explained in the next section of this brief, U.S. EPA is able to clean up relatively few of the existing problem sites, burdening the states with the remainder.

Had Congress intended to limit enforcement of CERCLA standards to a small percentage of the sites contaminated with hazardous substances, Congress would most certainly have made that clear. Instead, however, Congress provided broad authority to the district courts which did not distinguish between U.S. EPA sites and state sites.

Because the decision below creates exceptions to the operation of Section 121(e)(2) despite the absence of exceptions in the language of CERCLA itself, the Court should review this decision. Since this case is at the petition stage, the *amici* states will not dwell on the merits in any further detail. Instead, the following portions of this brief describe the national significance of the issue raised by this case and the adverse impact this decision will have on the cleanup of hazardous sites if allowed to stand.

II. Due To The Inability Of The U.S. Environmental Protection Agency To Clean Up Most Of The Nation's Voluminous Number Of Polluted Sites, The Injunctive Relief Extended By Congress To The States Under CERCLA To Address These Sites Is Crucial.

In 1989, the Administrator of U.S. EPA released a comprehensive report on the successes and failures of the federal Superfund cleanup program entitled "A Management Review of the Superfund Program" (hereinafter "Reilly Report"). A dominant, and in fact, perhaps the most pervasive, theme of this report was the crushing backlog of polluted facilities requiring cleanup.

U.S. EPA has compiled a staggering inventory of 31,000 sites which will be evaluated as candidates for inclusion on the National Priority List ("NPL"), the list of sites to be cleaned up under U.S. EPA's Superfund remedial program. Reilly Report, p. 1-6. According to the Reilly Report, U.S. EPA expected to add between 75 to 100 newly discovered sites to the evaluation inventory every year. *Id.*, at 3. These figures now appear to understate the pollution problem. At a U.S. EPA-state Superfund conference held during

December of 1990, the federal government disclosed that the total evaluation list is estimated to reach 50,000 to 60,000 sites. Some Congressional staff believe the figure may reach as many as 250,000 sites.

The current construction cost for cleaning up NPL sites is approaching $25 million for each site. *Id.*, at 1-7. As a result, the federal government (i.e., federal taxpayers) can currently afford to start 40 cleanup construction projects per year, with the private sector financing another 50 per year. *Id.*

While a number of the sites evaluated will be found to require no cleanup, a large number of them will need remediation. For example, Ohio currently has a list of approximately 1,200 sites to be evaluated of which approximately 435 will demand cleanup.

Due to the great number of polluted sites, U.S. EPA can only handle cleanup at a very small percentage of the sites. The NPL currently stands at 1,187 sites, with an additional 20 proposed for listing. This leaves a very large majority of the contaminated sites unattended by the federal government.

As the Reilly Report admitted, ". . . EPA cannot do everything at once." *Id.*, at 1-8. U.S. EPA, in fact, is nowhere close to addressing just the sites on the NPL, not to mention the multitude of contaminated sites which are unlisted.

As a result, state involvement in the cleanup of hazardous sites is critical to the protection of the public. The Reilly Report thus declares that "... the magnitude of the hazardous site cleanup problem is larger than EPA alone can manage and will require that States and EPA marshal their combined resources." *Id.*, at 3-26.

However, in the absence of injunctive authority to clean up these sites, state efforts are greatly restricted. Because the Tenth Circuit decision in *State of Colorado v. Idarado Mining Co.* removes from CERCLA the injunctive relief

provided to the states by Congress to address the mammoth nationwide hazardous substance problem, this is an important question of federal law which should be reviewed by this Court.

III. Without Injunctive Relief Under CERCLA, The States Cannot Use CERCLA To Compel Polluters To Comply With "Relevant and Appropriate" Cleanup Standards At The Many Polluted Sites Which Are Not Listed On The Federal National Priority List.

Under Section 121(e)(2) of CERCLA, remedial actions to clean up hazardous substances must satisfy the "legally applicable or relevant and appropriate" standards of federal and state law. Cleanup standards are legally "applicable" if there exists a state or federal law that already makes their use mandatory at a particular site. 40 CFR 300.5. For example, the federal Safe Drinking Water Act sets maximum contaminant level goals for certain pollutants in drinking water in certain situations, e.g., where the water is being supplied to twenty-five or more people. Because that law makes the maximum contaminant level goals mandatory in that situation, these levels are legally "applicable" standards when cleaning up groundwater under a Superfund site which is being provided to twenty-five or more people.

On the other hand, cleanup standards are "relevant and appropriate" if they are not "applicable" to the site but are designed to address problems sufficiently similar to the problems being encountered at the Superfund site. 40 CFR 300.5. The use of these standards is well suited to that site even though no law otherwise requires that they be used. For example, fewer than the required number of people may be using the groundwater at a Superfund site, thus failing to trigger the Safe Drinking Water Act. In this situation, it makes sense to use the Act's maximum contaminant level goals to clean up the groundwater anyway, in order to protect the people who are presently using the water and to cleanse the water for use by future generations. By applying "relevant and appropriate" standards to Superfund cleanups and thus

making those standards mandatory, CERCLA utilizes a common sense approach to cleanup and makes the remedy effective.

Because Section 121(e)(2) provides the states with injunctive relief to enforce all standards required by CERCLA, the states can enforce not only the "legally applicable" standards but the "relevant and appropriate" standards as well. Since both types of standards are essential for effective cleanup, injunctive relief to enforce those standards is vital for successful remedies at contaminated sites.

Idarado has taken the position that a state can enforce these standards only where U.S. EPA has already taken action at a site. Since "relevant and appropriate" standards are not legally applicable to the site, Idarado's argument deprives the state of the ability to apply these "relevant and appropriate" standards to the greater universe of sites at which U.S. EPA has taken no action. Due to the large number of sites which U.S. EPA is unable to tackle, the Tenth Circuit's adoption of Idarado's argument ironically forbids the use of "relevant and appropriate" standards at more sites than it allows. Because the Tenth Circuit has undermined the cleanup process protected by Section 121(e)(2), its decision should be reviewed and reversed.

IV. The Extraordinary Cost Of Cleaning Up The Large Number Of Polluted Sites Makes State Cleanup Of All Of These Sites Prior To Cost Recovery Impossible In The Absence Of Injunctive Relief.

The arguments of the Idarado Mining Company in this case seek to limit the states' Superfund cleanup authority to cost recovery. As will be explained below, the cost recovery option by itself falls well short of a complete remedy for the cleanup of hazardous substance sites.

Under the cost recovery option set forth in Section 107 of CERCLA, 42 U.S.C. 9607, a state may pay for the study and cleanup of a site and then file suit against the responsible

polluters to recover the cost of doing the work. This remedy alone, however, is not completely satisfactory. Requiring the states to foot enormous cleanup bills pending years of litigation against the polluters puts a tremendous burden on the states and greatly reduces the number of sites which can be remedied, even where the states sue for declaratory relief before fully completing cleanup.

In contrast, injunctive relief forces the polluters to shoulder the cleanup bills immediately instead of placing the burden on state taxpayers. Faced with the availability of injunctive relief, many polluters will voluntarily clean up their sites rather than wait for state taxpayers to do the task. Injunctive relief is thus not only consistent with the wording of CERCLA Section 121(e)(2), but is in accordance with Congressional policy to encourage expeditious cleanup by the persons responsible for causing the pollution. The Court should grant Colorado's petition so that both the statutory language and intent of Congress is effectuated.

CONCLUSION

The *amici* states respectfully request that the Court grant Colorado's Petition for a Writ of Certiorari in this case.

Respectfully submitted,

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